UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ELWANDA D. FOX,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	
	)	***Civil No. 99-264-P-C***
LIFE INSURANCE COMPANY	***)***	
OF NORTH AMERICA,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant Life Insurance Company of North America ("LINA") moves for summary judgment as to the two counts remaining against it in this Employee Retirement Income Security Act ("ERISA") action alleging the wrongful termination of the long-term disability benefits of plaintiff Elwanda D. Fox.[1] Defendant's Motion for Judgment on the Administrative Record or, in the Alternative, for Summary Judgment ("Motion") (Docket No. 19). For the reasons that follow, I recommend that the Motion be granted.

I. Summary Judgment Standards

[1] The parties stipulated to the dismissal with prejudice of Count III of Fox's three-count complaint. Stipulation of Dismissal of Count III of the Complaint (Docket No. 4); *see also generally* Complaint and Demand for Injunctive Relief ("Complaint") (Docket No. 1). The parties also stipulated to the dismissal with prejudice of one of the two original defendants in this case, Clark Equipment Company d/b/a Clark-Hurth Components. Stipulation of Dismissal (Docket No. 16).

LINA seeks judgment on the administrative record in view of its desire to exclude extraneous materials from the confines of the *de novo* standard of review that I have ruled applicable to this case. *See* Motion; Defendant's Reply Memorandum to Plaintiff's Objection to Defendant's Motion for Summary Judgment ("Reply") (Docket No. 29) at 2; Order on Discovery Dispute ("Order") (Docket No. 18) at 3. I noted in my earlier ruling that "the question whether [*de novo*] review may be limited to the record considered by the plan administrator or fiduciary remains open in this circuit." Order at 3. As it turns out, I perceive no need to divine an answer. The consideration of extraneous materials in this case is not outcome-determinative. Accordingly, I treat the Motion as one for summary judgment and consider all materials relevant to the bases for my recommended decision, regardless whether contained in the administrative record.

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the

showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

The summary judgment record, with *bona fide* conflicts resolved in the light most favorable to Fox, reveals the following material to this recommended decision:

Fox was employed by Clark Equipment Company d/b/a Clark-Hurth Components ("Clark") as a machine operator, "Class I." Defendant's Statement of Material Facts in Support of Motion for Judgment on the Administrative Record, etc. ("Defendant's SMF") (Docket No. 20) ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts, etc. ("Plaintiff's SMF") (Docket No. 25)/Response ¶ 1.[2] Clark sponsored a long-term disability ("LTD") plan for its employees (the "LTD Policy"), insured by LINA, a CIGNA-affiliate company.[3] Defendant's SMF ¶ 2; Plaintiff's SMF/Response ¶ 2. The LTD Policy provided in relevant part:

LONG TERM DISABILITY INCOME POLICY

INSURING PROVISIONS

LONG TERM DISABILITY BENEFITS (Continued)

Applicable to Class 1 & 2 Only

[2] Fox's statement of material facts contains two separately numbered sections titled "Plaintiff's Response to Defendant's Statement of Material Facts (DSMF) in Support of Motion for Judgment on the Administrative Record or in the Alternative for Summary Judgment," Plaintiff's SMF at 1, and "Plaintiff's Statement of Material Facts," *id.* at 24. For ease of reference, I shall refer to the former as "Plaintiff's SMF/Response" and the latter as "Plaintiff's SMF/Statement."

[3] The parties refer to "CIGNA" as well as "LINA" in their statements of material fact. Inasmuch as any distinction between the two is immaterial to resolution of this Motion, I shall refer to both as "LINA."

MENTAL ILLNESS, ALCOHOLISM AND DRUG ABUSE LIMITATION.

The Insurance Company will pay Monthly Benefits for no more than 24 months during an Employee's lifetime for Disability or Residual Disability caused or contributed to by any one or more of the following conditions:

Alcoholism
Drug addiction or abuse
Bipolar affective disorder (manic depressive syndrome)
Schizophrenia
Delusional (paranoid) disorder
Psychotic disorders
Depressive disorders[4]
Anxiety disorders
Somatoform disorders (psychosomatic illness)
Eating disorders
Mental Illness

This limitation shall not apply to any period of time during which the Employee is confined for more than fourteen consecutive days in a hospital licensed to provide care and treatment for the condition causing the Disability.

Defendant's SMF ¶ 40; Plaintiff's SMF/Response ¶ 40.[5] The LTD Policy provided for a six-month waiting period. Defendant's SMF ¶ 13; Plaintiff's SMF/Response ¶ 13.

Fox submitted to LINA a group LTD claim form dated December 2, 1995 claiming that she became totally disabled effective May 4, 1995. Defendant's SMF ¶ 3; Plaintiff's SMF/Response ¶ 3. She described her disability as follows: "Dizzy, off balance, arms are so sore and weak I can't lift them. Severe neck pain. I wear a neck collar all the time. My muscles are so sore I can't touch them and [sic] times can't move them. Confused at times. Can't sleep." *Id*. She complained of fatigue,

[4] In an apparent typographical error, LINA omitted the term "Depressive disorders" from the provision as quoted in its statement of material facts. The administrative record reflects, and both parties presume, that this term was in fact present. *See* Administrative Record ("AR"), attached as Appendix A to Defendant's SMF, at 24; Defendant's Memorandum of Law in Support of Motion for Judgment on the Administrative Record, etc. ("Defendant's Memorandum") (Docket No. 19) at 16; Objection to Defendant Life Insurance of North America's (LINA) Motion for Summary Judgment, etc. ("Opposition") (Docket No. 24) at 2.

[5] By memorandum dated March 5, 1993 LINA announced to claims personnel its adoption of new "mental illness limitation" language effective January 1, 1993. Defendant's SMF ¶ 41; Plaintiff's SMF/Response ¶ 41. The memorandum stated that LINA had adopted the new language "due to the fact that there have been disputes and disagreements about what constitutes 'mental illness.'" *Id*. "The wording of this limitation differs from wording previously used chiefly in [that] the list of conditions to which the limitation applies has (continued…)

nerves, headaches and of "hurting all over." Plaintiff's SMF/Statement ¶ 2; Defendant's Response to Plaintiff's Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 30) ¶ 2. Fox specified that she was treating with three doctors: Wodecki, Daly and DuBois. Defendant's SMF ¶ 3; Plaintiff's SMF/Response ¶ 3.

One of Fox's treating physicians, Dr. Wodecki, submitted to LINA an "Attending Physician's Statement of Disability" recording diagnoses of fibromyalgia, persistent neck pain and muscle weakness. Defendant's SMF ¶ 4; Plaintiff's SMF/Response ¶ 4. Under Box 8, titled "Physical Impairment," he rated Fox as having "Class 4 Moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity (60-70%)." *Id*. Under Box 9, titled "Mental/Nervous Impairment," he classified Fox as "Class 3 Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations (moderate limitation)." *Id*.

On January 26, 1996 William Roberson, a LINA benefit analyst, wrote to Drs. Daly, DuBois and Wodecki seeking further medical information. Defendant's SMF ¶ 5; Plaintiff's SMF/Response ¶ 5. LINA received responses that included the results of medical work-ups performed to investigate Fox's complaints of pain and weakness in her neck and other parts of her body. Defendant's SMF ¶ 6; Plaintiff's SMF/Response ¶ 6. An MRI scan of the right shoulder performed on February 6, 1996 concluded: "No definite abnormalities." *Id*. Craig DuBois, M.D., Fox's treating neurologist, performed EEG testing on June 2, 1995. Defendant's SMF ¶ 7; Plaintiff's SMF/Response ¶ 7. His reported impression was: "This is a normal 16 channel EEG." *Id*. An MRI of the cervical spine (including thoracic areas) performed on June 17, 1995 was reported as normal, with the exception of osteophyte formation with slight impingement on the cord. Defendant's SMF ¶ 8; Plaintiff's SMF/Response ¶ 8. An MRI of the brain found no hemodynamically significant areas of stenosis in

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been expanded to list a number of specific conditions." *Id*.

the areas that could be well visualized. AR at 180. A total bone scan performed on June 1, 1995 revealed "mild degenerative changes involving the cervical thoracic junction." Defendant's SMF ¶ 10; Plaintiff's SMF/Response ¶ 10.

On approximately March 20, 1996 LINA received a voluminous set of records from Dr. Wodecki, including many handwritten office notes, in which Dr. Wodecki noted depression, anxiety, right shoulder rotator cuff injury, fibromyalgia, neck pain, vertigo and abdominal pain. Defendant's SMF ¶ 11; Plaintiff's SMF/Response ¶ 11; AR at 206, 213, 215, 223. Dr. Wodecki's second "Attending Physician's Statement of Disability" diagnosed Fox as having fibromyalgia, along with a rotator cuff problem and polyarthralgia. Plaintiff's SMF/Statement ¶ 9; Defendant's Reply SMF ¶ 9. Fox continued to complain of headaches, fatigue, chronic pain, weakness and other symptoms. Plaintiff's SMF/Statement ¶ 10; Defendant's Reply SMF ¶ 10. Dr. Wodecki concluded that as of December 12, 1995 Fox was permanently disabled. Plaintiff's SMF/Statement ¶ 3; Defendant's SMF Reply ¶ 3.

On March 25th, LINA received a set of treatment records from Dr. DuBois that included his office notes and a narrative report dated March 20, 1996 directed to Roberson. Defendant's SMF ¶ 12; Plaintiff's SMF/Response ¶ 12. With respect to the arm, neck and muscle problems on which Fox's claim was based, he stated:

> Essentially the patient's symptoms are primarily subjective. Her main complaints of lethargy, muscle aches and pain, depression, lack of energy, etc. are difficult to substantiate by exam. Certainly by exam, she has a question of mild motor weakness, however, I have never been able to fully conclude that it is not partially giveway. Regardless, it is relatively good with at least 4+ MRC throughout. She does have some mild sensory changes consistent with perhaps some mild stocking glove neuropathy but again nothing severe to account for all of her symptoms. Certainly a significant component of her problems is her suspected depression. She is very resistent [sic] to feeling this could be a primary problem and it is often difficult to tell if this is a primary or secondary effect from her other problems, however, certainly we have been unable to document any clear abnormalities with her laboratory studies.

Defendant's SMF ¶ 12; Plaintiff's SMF/Response ¶ 12. Dr. DuBois' materials included a letter to "Disability Termination Services" dated January 30, 1996 in which he concluded: "At this time, given her multiple symptoms and problems, I do think it would be extremely difficult for her to function in any type of job capacity." AR at 163. He also wrote to LINA in March stating that "[c]ertainly in her current state, I think she is unable to maintain a job and this would have been probably since at least 5/5/95." Plaintiff's SMF/Statement ¶ 5; Defendant's Reply SMF ¶ 5.

Dr. Daly, a psychiatrist, diagnosed Fox with with major depression and chronic pain syndrome, noting chronic muscle pain and a question of fibromyalgia. Plaintiff's SMF/Statement ¶ 8; Defendant's Reply SMF ¶ 8; AR at 239-40.

By letter dated July 24, 1996, authored by Roberson, LINA denied Fox's claim. Defendant's SMF ¶ 14; Plaintiff's SMF/Response ¶ 14. The letter stated:

> Information on file indicates that you have been treated for fibromyalgia. However, the medical iformation [sic] submitted fails to support a condition of total disability as defined above. From Dr. Dubois we have medical reports dated 3/20/96, 1/30/95, 12/7/95, 10/17/95, 9/15/95 & 6/5/95. In those reports he states that your complaints are primarily subjective and he has been unable to document any clear abnormalities with her [sic] laboratory studies. Dr. Dubois feels that the fibromyalgia is not severe enough to be totally disabling. However, he does state that he feels that your primary condition causing your symptoms is psychiatric. The combination of these factors may be disabling however we have no evidence of treatment for a psychiatric impairment.
>
> Information from Dr. Wodecki covers the period of 5/95 through 2/96. His reports document coplaints [sic] of pain in shoulders, arms, neck and back and complaints of headaches along with sleeplessness. But for the same symptoms Dr. Dubois felt they were not severe enough to deem you totally disabled.
>
> As a result your claim has been terminated effective 11/2/95 and no benefits are payable.

Id.

Within weeks of the denial, Roberson received a letter from David Lobozzo, M.D., a psychiatrist who had recently begun treating Fox. Defendant's SMF ¶ 15; Plaintiff's SMF/Response ¶ 15. The letter, dated August 22, 1996, stated in pertinent part:

> I am writing on behalf of my patient, Elwanda Fox. . . . I have been Elwanda's attending psychiatrist since she came to Maine from North Carolina. She is suffering from a Major Depressive Episode which started about one year ago. Symptoms of this depression include insomnia, hallucinations, confusion, and a general inability to function. She also is experiencing anhedonia with a loss of interest in things that she use [sic] to do; for example, gardening. Her appetite is poor and her energy level is poor. She has not had a good response to antidepressant medication and her situation is complicated by arthritis and fibromyalgia.
>
> There is no doubt in my mind that she is not able to work at this time. I was quite surprised to learn that she had worked for ten years at the Clark Equipment Company as she is so debilitated both physically and mentally at this time that it seems hard to imagine that she ever worked. There has clearly been a rapid and severe deterioration in her condition. . . . In the case of a Major Depressive Episode, there are no laboratory tests or X-ray tests that can be done, but from a clinical perspective, there is no question that she is suffering a great deal and is 100% incapacitated by this.

Id.

John Wisniewski, a LINA benefit analyst, responded to Fox by letter dated September 13, 1996, acknowledging receipt of Dr. Lobozzo's letter but explaining that LINA could not consider an appeal until directed to do so by Fox. Defendant's SMF ¶ 16; Plaintiff's SMF/Response ¶ 16. Fox submitted a handwritten letter to LINA, received on October 14, 1996, stating, "I wish to appeal your findings, & decisions, concerning my claim." Defendant's SMF ¶ 17; Plaintiff's SMF/Response ¶ 17. Wisniewski wrote to Dr. Lobozzo on October 25, 1996 to request copies of office notes and test results from May 1995 to the then-present time. Defendant's SMF ¶ 19; Plaintiff's SMF/Response ¶ 19. He also wrote a memorandum to a colleague, J. Zahren, noting the appeal. Defendant's SMF ¶ 20; Plaintiff's SMF/Response ¶ 20. Zahren responded with a note directing: "Go ahead and request records from Dr. Lobozzo. She's not TD [totally disabled] 2d Fibromyalgia, but if Dr. L's records

support psych TD, we will consider opening." Defendant's SMF ¶ 21; Plaintiff's SMF/Response ¶ 21.

On November 18, 1996 the claims office received a voluminous packet of records from Dr. Lobozzo, documenting Fox's treatment at Tri-County Mental Health Services by Dr. Lobozzo and others from March 25, 1996 through November 1, 1996. Defendant's SMF ¶ 22; Plaintiff's SMF/Response ¶ 22. Wisniewski forwarded these records to Zahren. Defendant's SMF ¶ 23; Plaintiff's SMF/Response ¶ 23. Scott Parker of LINA authored a handwritten memorandum dated January 28, 1997 that stated in pertinent part:

> Claim was originally denied because insured was not being treated for disability condition (i.e., Mental Illness). Ins has since begun treatment & dx [diagnosis] of Major Depressive Episode has been given. I reviewed the DSM IV & Ms. Fox meets the criteria to a T.
>
> Although she didn't treat originally for this dx. the symptoms were present, and thoroughly documented. The AP's [attending physicians] also suspected this was the case. Therefore, given nature of dx, it is reasonable that an individual may deny the presence of a mental disorder until it becomes necessary. For this reason we cannot punish an individual.
>
> Please reopen claim under M/N provision. Be sure to clearly communicate this fact and also that benefits W/B terminating on or before 11/1/97. I would encourage her to deal w/rehab as it appears she is functioning better.

Defendant's SMF ¶ 24; Plaintiff's SMF/Response ¶ 24. Further claims-handling instructions were conveyed in a series of memoranda among Wisniewski, Zahren and LeeAnn Weldon, a new benefit analyst. Defendant's SMF ¶ 25; Plaintiff's SMF/Response ¶ 25.

By letter dated March 24, 1997 (the "March 24th Letter") Weldon informed Fox that her appeal had been granted and her claim for LTD benefits approved for the period November 2, 1995 through November 1, 1996. Defendant's SMF ¶ 26; Plaintiff's SMF/Response ¶ 26. The letter, which explained that LINA was awaiting medical information from Dr. Lobozzo for the period from November 1, 1996 to the present, stated:

> The Insurance Company will pay Monthly Benefits for no more than 24 months during the Employee's lifetime for Total Disability caused or contributed to by mental illness while the Employee is not confined in a hospital. An Employee will be considered confined in a hospital only if he is confined continuously for at least 14 days in a hospital licensed to provide care and treatment for the condition causing Total Disability. The benefit termination date for your claim is November 2, 1997.

Id.

John E. Sedgewick of Berman & Simmons, P.A., counsel for Fox, first contacted LINA by letter of April 4, 1997. Defendant's SMF ¶ 28; Plaintiff's SMF/Response ¶ 28. Sedgewick requested that LINA "send me copies of all documents you have received from Mr. and Mrs. Fox and all medical records in your possession relating to Ms. Fox." *Id*. He further commented: "We disagree with your determination that Mrs. Fox's disability is limited by the 'Mental Illness' clause referred to in your letter. I believe the medical evidence will demonstrate that Mrs. Fox is totally physically disabled. To the extent that you have not already received all of the medical documentation available regarding Mrs. Fox's condition, I will be sure you receive it." *Id*. By letter dated May 12, 1997 Weldon forwarded the requested records to Sedgewick. Defendant's SMF ¶ 31; Plaintiff's SMF/Response ¶ 31.

Weldon sought consultation from other claims personnel concerning Sedgewick's contention that Fox was physically disabled and, in his opinion, not subject to the twenty-four month limitation. Defendant's SMF ¶ 33; Plaintiff's SMF/Response ¶ 33. She questioned whether the file should be referred to a nurse and ultimately a doctor "for evaluation of physical medical + any info they can provide about what is here." *Id*.; AR at 44. On or about May 19, 1997 LINA received another packet of records from Dr. Lobozzo covering the period through April 10, 1997. Defendant's SMF ¶ 34; Plaintiff's SMF/Response ¶ 34. Dr. Lobozzo recorded an assessment of major depressive episode with unusual psychotic features. AR at 53-56. Complaints of physical problems, including headaches, also were noted. *Id*. at 57-60.

Upon consideration of Tri-County Mental Health Services records, Wisniewski wrote to Fox on August 19, 1997 (the "August 19th Letter"), informing her:

> We have received the medical evidence from you [sic] physicians and it does support continued disability as per your policy. The medical evidence does not support a physical disability therefore you are subject to the mental nervous provision of the policy. This policy only allows us to pay benefits for 24 months therefore your claim will terminate November 1, 1997.

Defendant's SMF ¶ 35; Plaintiff's SMF/Response ¶ 35.

LINA again wrote Fox on October 7, 1997 (the "October 7th Letter") noting that benefits would terminate effective November 1, 1997. Defendant's SMF ¶ 36; Plaintiff's SMF/Response ¶ 36. The letter accurately set forth the language contained in the policy limiting monthly benefits to twenty-four months for "[d]isability or residual disability caused by or contributed to by one or more of the following conditions: . . . Psychotic disorders, Depressive disorders, Anxiety disorders, . . . Mental illness." *Id*. The letter further stated:

> Since your diagnosis is that of depression, which is considered a mental illness, you would therefore, be entitled to Long Term Disability benefits for a total period of 24 months during your lifetime. . . .
>
> You may request a review of this denial by writing to the representative signing this letter. The written request for review must be sent within 60 days of receipt of this letter and state the reasons why you feel your claim should not have been denied. Include any documentation (medical/dental records) which you feel supports your claim. Under normal circumstances, you will be notified of the final decision no later that [sic] 120 days after your request for review is received.

Id. LINA ceased benefits to Fox effective November 1, 1997. Defendant's SMF ¶ 37; Plaintiff's SMF/Response ¶ 37.

No medical records were submitted to LINA after April 4, 1997 in support of Fox's disability claim apart from the Tri-County Mental Health records sent at LINA's request. Defendant's SMF ¶ 38; Plaintiff's SMF/Response ¶ 38. No further appeal was made to LINA. Defendant's SMF ¶ 39; Plaintiff's SMF/Response ¶ 39.

Following the filing of the instant suit Fox designated Marc Miller, M.D., of Portland, Maine, a treating physician whose records had never been submitted to LINA, as a potential expert. Defendant's SMF ¶ 44; Plaintiff's SMF/Response ¶ 44. Dr. Miller was deposed on May 26, 2000. Defendant's SMF ¶ 45; Plaintiff's SMF/Response ¶ 45. Dr. Miller, a board-certified specialist in rheumatology and internal medicine, treated Fox from April 5, 1996 to December 16, 1998. Defendant's SMF ¶ 46; Plaintiff's SMF/Response ¶ 46. Fox sought his care for ongoing management of her chronic pain. Defendant's SMF ¶ 47; Plaintiff's SMF/Response ¶ 47. Dr. Miller testified that he performed tests on Fox that ruled out the presence of systemic inflammatory rheumatic disease. Deposition of Marc Miller, M.D., attached as Appendix C to Defendant's SMF, at 9-10. Dr. Miller diagnosed Fox as having marked depression with associated myalgias. *Id*. at 13. He testified, "I think her restrictions and her inability to function is . . . mostly based on her depression and that her musculoskeletal symptoms are secondary to her depression." *Id*. at 15. Asked whether Fox's depression "cause[d] or contribute[d] to the disability," he responded: "Yes." *Id*. at 18-19.

In connection with her opposition to the Motion, Fox also submitted an affidavit of Richard E. Fortier, Jr., M.D.[6] *See* Affidavit of Richard E. Fortier, Jr., M.D. (Docket No. 26). Dr. Fortier, a psychiatrist, states: "It is my opinion that the majority of conditions commonly classified as depression are caused by chemical imbalances in the human body and can be and are treated medically with appropriate drugs." *Id*. ¶¶ 1, 5. "The nature of the chemical imbalance that causes depression is a malfunction in the part of the brain that regulates mood." *Id*. ¶ 6. In Dr. Fortier's opinion, Fox's treatment with Effexor, Klonopin, Inderal and Zoloft suggested that her condition would be commonly characterized as an organically based medical condition. *Id*. ¶¶ 9-10.

III. Analysis

[6] LINA seeks exclusion of the Fortier affidavit on the ground that Fox failed to designate Dr. Fortier as an expert witness. Reply at 2- (continued…)

LINA argues *inter alia* that it is entitled to summary judgment on the basis of Fox's failure to exhaust her administrative remedies. Defendant's Memorandum at 20-23. I agree. In contract-dispute matters, ERISA plaintiffs must exhaust available administrative remedies before resorting to court. *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988); *see also Morais v. Central Beverage Corp. Union Employees' Supp. Retirement Plan*, 167 F.3d 709, 712 n.4 (1st Cir. 1999) ("It is well settled that there is a firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases, and this court adheres to that requirement for contract-based claims.") (citations and internal quotation marks omitted). Litigants are excused from this requirement to the extent that administrative remedies can be shown to have been inadequate or their exercise futile. *Drinkwater*, 846 F.2d at 826. However, "[a] blanket assertion, unsupported by any facts, is insufficient to call this exception into play." *Id*.

Although neither party in its statement of material facts quotes or cites LTD Plan provisions pertaining to internal remedies, the summary judgment record nonetheless reveals that (i) by letter dated July 24, 1996 LINA denied Fox's claim, (ii) by letter received on October 14, 1996 Fox appealed the denial, (iii) via the March 24th Letter LINA informed Fox that her appeal had been granted and benefits approved for the period November 2, 1995 to November 1, 1996, (iv) via the August 19th Letter LINA informed Fox that benefits were approved for an additional one-year period, through November 1, 1997, and (v) via the October 7th Letter LINA informed Fox that benefits would cease on November 1, 1997. All three post-appeal letters made clear the company's position that benefits would be payable for at most twenty-four months pursuant to the mental-illness limitation; only the third and final letter adverted to the availability of a further internal appeals process. Shortly after the issuance of the first post-appeal letter (*i.e.*, the March 24th Letter), LINA was put on notice

3. Inasmuch as nothing turns on the inclusion of this evidence, I have considered it.

that Fox was represented by counsel and that counsel disagreed with the application of the twenty-four month limitation.

Fox endeavors to fit herself within the "futility" exception but proffers little more than the type of "blanket assertion" decried by the First Circuit. She first claims that she, like the plaintiff in *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990), was placed in a position in which she was deprived of meaningful access to the insurer's appeal procedures a recognized type of "futility." Opposition at 27-28. In *Curry* the plaintiff was left in the dark as to how to go about pursuing internal remedies (if any) when his employer twice failed to forward applicable plan documents in response to his attorney's requests. *Curry*, 891 F.2d at 844, 846-47. Here, there is no evidence that Fox either lacked the necessary plan documents or was refused access to them.

Fox nonetheless suggests that LINA's series of post-appeal letters was so confusing as to be tantamount to a deprivation of meaningful access to appeal procedures inasmuch as (i) LINA waited until its third, seemingly superfluous post-appeal communication to apprise Fox of further appeal rights and (ii) the adverse decision came in the form of a response to an appeal, rather than comprising the type of denial of a "new claim" that one reasonably could assume would trigger appeal rights. Opposition at 28-29. In Fox's view, " [u]nder these unique circumstances, it was perfectly reasonable for [her] not to take any further action directly with LINA but to believe that she had heard its final word and that she either did not have the right to appeal or that an appeal would be futile, in light of the three letters saying she was limited to the mental illness exclusion." *Id*. at 29.[7]

Fox could not reasonably have believed that she had no further right to appeal in view of LINA's express, clear notification to the contrary in the October 7th Letter. That LINA did not advise Fox of any such right via the March 24th Letter is not surprising inasmuch as LINA then was still

[7] I do not understand Fox to be arguing that the appeal mechanism presented by LINA differed from that outlined in the LTD Plan, the (continued…)

mulling whether to pay an additional year's LTD benefits and seeking information regarding the same. Arguably LINA should have advised Fox of an appeal right via the August 19th Letter, which seemingly reported its final action on the claim; however, the conveyance of those rights via the October 7th Letter, which served as a reminder of the imminent cutoff of benefits, was not so illogical or distant in time as to be confusing. Nor is the provision of an appeal of a decision rendered on appeal a strange or confusing concept particularly where, as here, the appeal decision, while not pertaining to a new "claim," represented a new stance on the part of the insurer.

Nor does LINA's reiteration in all three post-appeal letters of its decision to impose the twenty-four-month limitation demonstrate the futility of any further appeal. LINA was sufficiently flexible to have changed its mind following Fox's initial appeal. Benefit analyst Weldon consulted with other daims personnel regarding Fox's counsel's position that Fox was totally physically disabled; however, inasmuch as appears, counsel did not provide LINA with detailed argument or additional documentation in support of that position.

In any event, even were the court to reach the merits of the remaining two counts against LINA, the grant of the Motion would be warranted. Fox in Count II seeks "damages under 29 U.S.C. § 1109 and 1132(a)(2)" for alleged breach of fiduciary duties imposed by ERISA. Complaint ¶¶ 40-43. LINA points out, and Fox does not contest in her opposition, that the cited provisions afford no private right of action for extra-contractual damages. *See* Defendant's Memorandum at 2; Opposition; *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985); *Drinkwater*, 846 F.2d at 824-25.

This leaves Count I, in which Fox alleges wrongful denial of benefits. *See* Complaint ¶¶ 36-39. The LTD Policy limits benefits to twenty-four months in cases in which a claimant's disability is

applicable provisions of which are not included by either party in the summary judgment record.

"caused or contributed to by . . . [d]epressive disorders." LINA argues persuasively that even under the non-deferential *de novo* standard of review, the application of this wording in Fox's case is straightforward. *See, e.g.*, Defendant's Memorandum at 11-13. There is indeed ample evidence of record both that Fox had a "depressive disorder" and that this disorder "contributed to" her disability. The clear policy language requires no more. *See Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989) ("Notwithstanding the ennobling purposes which prompted passage of ERISA, courts have no right to torture language in an attempt to force particular results or to convey delitescent nuances the contracting parties neither intended nor imagined. To the exact contrary, straightforward language in an ERISA-regulated insurance policy should be given its natural meaning.").

Fox expends considerable energy in arguing that the term "mental illness" is ambiguous, contending that inasmuch as LINA actually denied her claim on the basis of that categorization (rather than as a "depressive disorder"), the court must likewise confine its review to that ground. Opposition at 13-25.

Neither Fox nor LINA cites any authority for the proposition that a court may, or may not, uphold an ERISA benefits denial on grounds different from those communicated to a claimant. *See* Opposition at 22, 24; Reply at 6-8. In fact, at least two circuit courts of appeal have considered the issue, each permitting the assertion of a new basis for denial of ERISA benefits for the first time on judicial review. *Weber v. St. Louis University*, 6 F.3d 558, 560 (8th Cir. 1993) (holding that in context of *de novo* review, "a trial court must consider all of the provisions of the policy in question if those provisions are proferred to the trial court as a reason for denial of coverage, since to do otherwise would permit the oral modification of employee welfare plans governed by ERISA, a result manifestly in conflict with the intent of the statute and with the case law governing it.") (citation and

internal quotation marks omitted); *Loyola Univ. of Chicago v. Humana Ins. Co.*, 996 F.2d 895, 901 (7th Cir. 1993) (holding in context of review under arbitrary and capricious standard that "[t]he mere omission of a defense in a letter to a plan beneficiary does not constitute a waiver of the defense"; noting that waiver entails "a voluntary and intentional relinquishment of a known right.").

On the other hand, at least one district court has held in the context of a *de novo* review that "a basis for declining ERISA plan benefits is waived by the plan's failure to assert that basis at the administrative level when squarely faced with the issue." *McCoy v. Federal Ins. Co.*, 7 F. Supp.2d 1134, 1145 (E.D. Wash. 1998). The *McCoy* court, struggling to harmonize Ninth Circuit precedent, *id*. at 1143-45, apparently based its holding at least in part on the existence of ERISA notice requirements that "serve[] to afford the beneficiary an explanation of the denial of benefits that is adequate to ensure that further review of that denial, both administrative and judicial, is meaningful," *id*. at 1143.

Even were the *McCoy* reasoning persuasive, it is distinguishable on its facts. The plan administrator in *McCoy* notified the plaintiff that it was denying his claim for benefits on two bases: that his deceased wife was not an "Insured" because she was not on her employer's payroll at the time of her death and that she was not traveling on the business of her employer at that time. *Id*. at 1139-40. The declination letters did not assert that McCoy was not an employee the defense that the plan administrator was attempting to raise on judicial review. *Id*. at 1140. In this case, the three post-appeal letters made what amounts to shorthand references to the provision of the LTD Policy (titled "Mental Illness, Drug Abuse and Alcohol Limitation") upon which LINA relied in its administrative proceedings and upon which it continues to rely in this forum. The provision itself, which was quoted

in the October 7th Letter, sufficed to put Fox on notice that benefits could be limited on the basis of a diagnosis of certain specific types of "mental illness," including "depressive disorders."[8]

Fox argues finally that "[e]ven if the Court rejects plaintiff's argument that the mental illness limitation in the LINA policy is ambiguous and cannot therefore be enforced against her, it must still find in plaintiff's favor because that provision is void as against public policy." Opposition at 25. For this proposition Fox cites an "analogous precedent" holding that a two-year limitation on benefits payable for mental illnesses contravened the Americans with Disabilities Act (the "ADA"), *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158 (E.D. Va. 1997). *Id*. Fox also suggests that this court in *Conners v. Maine Med. Ctr.*, 42 F. Supp.2d 34 (D. Me. 1999), another ADA case, cited *Lewis* favorably as well as other authority indicating that a "public policy" type of argument might have merit if clothed in ERISA garb. Opposition at 26-27.

These arguments fall well short of the mark. All seven circuit courts of appeals that have considered the "analogous" ADA issue, including the Court of Appeals for the Fourth Circuit in overturning a decision related to the *Lewis* case on which Fox relies, have held that such a limitation does not contravene the ADA. *See EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000) ("Today we join six other Courts of Appeals in concluding that Title I of the ADA does not bar entities covered by the statute from offering different long-term disability benefits for mental and physical disabilities"; citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116-18 (9th Cir. 2000), *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1101-02 (10th Cir. 1999), *Lewis v. Kmart Corp.*, 180 F.3d 166, 170 (4th Cir. 1999), *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir.

[8] Fox weakly argues that the term "depression" is also ambiguous inasmuch as her depression was organically based, produced physical as well as mental symptoms and she suffered from independent physical conditions, including fibromyalgia. Opposition at 23-25. These facts do not create ambiguity. The only question presented by the applicable LTD Policy language is whether a condition diagnosed as a type of depression qualifies as a "depressive disorder." Clearly, it does. Fox's related argument, that the entire mental-illness provision should be construed as ambiguous because it arbitrarily distinguishes between mental and physical conditions, (continued…)

1998), *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) and *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996)).

This court did not cite *Lewis* favorably; to the contrary, it explicitly rejected it. *See Conners*, 42 F. Supp.2d at 54-55. This court did cite the following language from the *CNA* case:

> [The plaintiff] raises a different kind of discrimination claim, more grist for the ERISA mill or the national health care debate than for the ADA. She claims that the plan discriminates against employees who in the future will become disabled due to mental conditions rather than physical conditions; their present dollars (unbeknownst to them) are buying only 24 months of benefits, instead of benefits lasting much longer. However this is dressed up, it is really a claim that benefits plans themselves may not treat mental health conditions less favorably than they treat physical health conditions.

Id. at 53 (quoting *CNA*, 96 F.3d at 1044). However, neither this court in quoting this dictum, nor the Court of Appeals for the Seventh Circuit in authoring it, implied that any cause of action currently exists under ERISA for the imposition of a limitation on the duration of benefits paid for mental-health conditions.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 20th day of September, 2000.

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id. at 24, implicates public-policy rather than contract-construction concerns.

David M. Cohen
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-264

FOX v. LIFE INSURANCE CO OF, et al — Filed: 08/31/99
Assigned to: JUDGE GENE CARTER — Jury demand: Plaintiff
Demand: $0,000 — Nature of Suit: 791
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 29:1002 E.R.I.S.A.: Employee Retirement

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v.

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